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No. 89-1380

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In The
Supreme Court of the United States
October Term, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.
JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a debtor may, pursuant to 11 USC Section 522(f)(1), avoid a lien against debtor's homestead property, which lien was granted in a contested divorce action to secure an equalizing payment upon property division.

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STATEMENT OF FACTS

A. Procedural Status.

Gerald J. Sanderfoot filed a petition for relief pursuant to Chapter 7 of the United States Bankruptcy Code on May 4, 1987, in the United States Bankruptcy Court for the Eastern District of Wisconsin (App. at 44a). As part of Mr. Sanderfoot's schedules, he listed his homestead property located in Hortonville, Wisconsin (App. at 48a) and claimed the same as exempt pursuant to Section 815.20, Wisconsin Statutes.[1]

Mr. Sanderfoot's schedules reflect two (2) mortgages against his homestead and a lien awarded to his ex-wife, Jeanne Farrey, formerly known as Jeanne Sanderfoot, petitioner herein (App. at 47a). That lien was granted by the Circuit Court for Outagamie County, Wisconsin in a judgment of divorce between Mr. and Mrs. Sanderfoot (App. pp. 49a-61a) for purposes of equalizing a property division. As the lien impaired Mr. Sanderfoot's homestead exemption, a motion to avoid the lien pursuant to 11 USC Sec. 522(f)(1) was filed on June 8, 1987. On June 25, 1987, Ms. Farrey objected to the lien avoidance.

The Bankruptcy Court, the Honorable Margaret Dee McGarity presiding, issued a written decision denying Mr. Sanderfoot's motion [*In re Sanderfoot*, 83 BR 564

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[1] Pursuant to 11 USC Sec. 522(b), a debtor in a bankruptcy case may choose between the "federal" exemptions provided for in 11 USC Sec. 522(d), or those exemptions provided for in the state of domicile, unless the law of the state of domicile specifically provides that the "federal" exemptions are not available. Wisconsin has not opted out of the federal system.

(Bankr. E.D. Wis 1988), App. p. 25a]. Upon appeal to the United States District Court for the Eastern District of Wisconsin, the Bankruptcy Court's decision was reversed [*In re Sanderfoot*, 92 BR 802 (E.D. Wis 1988), App. p. 22a]. The United States Court of Appeals for the Seventh Circuit affirmed the District Court [*In re Sanderfoot*, 899 F2d 598 (7th Circuit, 1990), App. p. 1a].

This Court granted Ms. Farrey's petition for certiorari on November 27, 1990.

B. Facts of the Case.

Gerald J. Sanderfoot and Jeanne Farrey (Sanderfoot) were married on August 12, 1966, and divorced on September 12, 1986 (App. pp. 44a-59a and attached to the Statement of Stipulated Facts in the District Court). The divorce action had been commenced in 1984 in the Circuit Court for Outagamie County, Wisconsin.

The divorce was contested on all issues, including child support, separate maintenance and property division. Judgment of divorce and property division was granted by the trial court on September 12, 1986. [See Section 806.06(1)(d), Wisconsin Statutes.] The written judgment was entered on February 5, 1987. [See Section 806.06(1)(h), Wisconsin Statutes.] The judgment of divorce terminated the marital status of the parties and fixed their respective financial rights effective September 12, 1986, pursuant to Section 767.37(3), Wisconsin Statutes, *Brandt v. Brandt*, 145 Wis 2d 394, 421, 427 NW 2d 126 (Wis. App. 1988).

As part of the divorce judgment, the Circuit Court awarded the parties' homestead, business and various personal property to Mr. Sanderfoot. Ms. Farrey was awarded various personal property and, to equalize the property division, the sum of $29,208.44.[2] Mr. Sanderfoot was also "awarded" in excess of $78,000.00 of debt with Ms. Farrey being "awarded" $999.10 of debt (App. pp. 60a-61a).

The trial court provided that Mr. Sanderfoot was to make the balancing payment to Ms. Farrey of $29,208.44 in two installments, due on January 10 and April 10, 1987. The Court awarded Ms. Farrey a lien as follows:

> "The petitioner herein shall have a lien against the real estate of the respondent for the total amount of money due her pursuant to this order of the Court, i.e. $29,208.44, and said lien shall remain attached to the real property of the respondent until the total amount of money is paid in full. Specifically, the lien shall attach to the house/real estate of the respondent located at 540 Island Road, Route 2, Hortonville, Town of Greenville, Outagamie County, Wisconsin, and more specifically and legally described as . . . (legal description omitted)" (App. p. 57a).

Eight months after the granting of the judgment of divorce, Mr. Sanderfoot filed the bankruptcy petition. The sequence of events leading up to this Court granting Ms.

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[2] Section 767.255, Wisconsin Statutes, presumes an equal division of marital estate, subject to various statutory factors, none of which is relevant herein. Additionally, Section 767.255 provides: " . . . the Court shall divide the property of the parties and divest and transfer the title of any such property accordingly."

Farrey's petition for certiorari is set forth in Subsection A of this statement.

The objection of Ms. Farrey to the lien avoidance motion also contained an objection to Mr. Sanderfoot's valuation of the real estate in the bankruptcy, claiming the Bankruptcy Court was bound by the value determined by the divorce court on September 12, 1986 (App. p. 25a). The Bankruptcy Court ruled that it was not bound (App. p. 37a). There was no objection to the claim of exemptions filed pursuant to Bankruptcy Rule 4003(b). Additionally, no creditor, including Ms. Farrey, filed any adversary action pursuant to 11 USC Sec. 523(c) or 11 USC Sec. 727. Mr. Sanderfoot was granted a discharge on February 10, 1989.

SUMMARY OF ARGUMENT

The Seventh Circuit Court of Appeals, in deciding this case, examined and analyzed the requirements of 11 USC Section 522(f)(1), providing for avoidance of judicial liens which impair a debtor's exemptions. The starting point of any such inquiry is the language of the statute itself. The decision of the Seventh Circuit adopts the rational of the *In re Pederson*, 875 F2d 781 (9th Cir. 1989), line of cases.

That line of cases holds that when a divorce court grants a lien upon the homestead of the debtor to secure payment of property division, such a lien meets the three requirements of Section 522(f)(1) and is avoidable. Petitioner has argued that such a lien does not fix upon an

interest of the debtor and that the lien does not impair debtor's exemptions and is thus nonavoidable.

Petitioner's argument ignores the discretion vested in the divorce court to " . . . divest and transfer the title . . . " to marital property (Section 767.255, Wisconsin Statutes) and the clear language of the judgment of divorce which awarded the homestead real estate to Mr. Sanderfoot. In making that award, the divorce court extinguished the pre-existing property rights and created new rights.

The new rights created by court order were sole ownership of various property in Mr. Sanderfoot and a debt of $29,208.44 owed by Mr. Sanderfoot to Ms. Farrey, secured by a lien. The lien attached to his interest, as no one else had any.

Ms. Farrey further argues that because Wisconsin treats a lien in a divorce judgment "like a mortgage" for purposes of joint tenancy survivorship, it is "like a mortgage" for all purposes. Ms. Farrey ignores the factual differences in the case at bar and the specific provisions of Section 815.20(1), Wisconsin Statutes, providing that a homestead is exempt from the " . . . lien of every judgment . . . . "

However, regardless of how Wisconsin may treat the lien, it is federal law rather than state law which will determine avoidability of a lien under Section 522(f)(1). Since the Bankruptcy Code itself defines all of the necessary terms and Mr. Sanderfoot's homestead would be exempt "but for" the judicial lien, the second and third requirements of Section 522(f)(1) are met.

The legislative history of 11 USC Section 522(f), taken with the provisions of 11 USC Section 522(c) and 11 USC Section 523(a)(5), clearly demonstrates that Congress did not intend to treat contested property division judgment liens differently from any other judgment lien.

Rather than seeking to implement the plain language of the statute and the intent of Congress, Ms. Farrey seeks to have this Court determine policy which must be determined by Congress and not the courts.

ARGUMENT

The sole issue presented in this matter is whether a lien granted in a contested divorce to a former spouse to balance a property division is a judicial lien, voidable pursuant to 11 USC Sec. 522(f)(1). The issue resolves itself to a question of what does the applicable statute mean and what was Congress's intent.

I. EACH OF THE ELEMENTS OF 11 USC SECTION 522(f)(1) HAVE BEEN ESTABLISHED IN THIS CASE SO THAT THE LIEN AWARDED IN THE CONTESTED DIVORCE ACTION IS AVOIDABLE.

As conceded by petitioner, the beginning point is the language of the statute. *United States v. Ron Pair Enterprises, Inc.*, 489 US 235, 241 (1984). Br. at 18. Section 522(f)(1) reads, in its entirety, as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to

> which the debtor would have been entitled under subsection (b) of this section, if such lien is –
>
> (1) a judicial lien;"

The language above set forth gives rise to three requirements:

1. The lien must fix on an interest of the debtor in property;
2. The lien must impair an exemption to which the debtor would otherwise be entitled; and
3. The lien is a judicial lien.

Petitioner alleges that the first two elements are not met and does not discuss the third.

A. The Lien of the Divorce Judgment Fixed Upon an Interest of Mr. Sanderfoot Because No One Else Had an Interest at the Time of the "Fixing" of the Lien.

Petitioner argues that "(t)he lien should not be avoided because it did not fix on the debtor's pre-existing property interest" (Br. at p. 18). This argument adopts the rationale of the line of cases represented by *Boyd v. Robinson*, 741 F2d 1112 (8th Cir. 1984). The argument of petitioner and the *Boyd* line of cases, however, ignores the very clear change in property rights effected by a judgment of divorce and the provisions of Section 767.255, Wisconsin Statutes, allowing the divorce court to " . . . divest and transfer the title . . . " of marital property. See Footnote No. 2.

Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-

existing undivided one-half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place.[3] Those new rights were as follows:

A. Outright ownership of the "real estate – house" and various other assets to Mr. Sanderfoot (Judgment of Divorce, App. p. 51a), free and clear of the rights of Ms. Farrey (Judgment of Divorce, App. p. 58a).

B. Ms. Farrey was given, in place of her pre-existing rights, various assets and a debt of $29,208.44, secured by lien on Mr. Sanderfoot's property (Judgment of Divorce, App. pp. 56a-57a).

Thus, as Judge Ross stated in his dissent in *Boyd v. Robinson*, 741 F2d at 1115:

> "What had been a property interest became simply collateral for a debt. Since the house was simultaneously vested solely in *Boyd*, the lien *must* have attached to her interest in the house, for no one else possessed any ownership interest in the house."

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[3] Both the Bankruptcy Court in its decision (App. p. 32a) and Ms. Farrey in her brief seem to contend that Wisconsin's Marital Property Act, Chapter 766, Wisconsin Statutes, is relevant or somehow controlling regarding divesture of ownership by divorce decree. *Kuhlman v. Kuhlman*, 146 Wis 2d 588, 432 NW 2d 295 (Wis. App. 1988), holds that the Wisconsin Marital Property Act " . . . has nothing to do with division of property on dissolution of a marriage" (p. 591). Additionally, Section 766.75, Wisconsin Statutes, clearly provides that the divorce decree will control. In this case, the divorce court clearly terminated the parties marital property interests and created sole ownership in Mr. Sanderfoot. See Judgment of Divorce, App. p. 51a.

See also *In re Pederson*, 875 F2d 781 (9th Cir. 1989); *Maus v. Maus*, 837 F2d 935 (10th Cir. 1988); and *In re Sanderfoot*, 899 F2d 598 (7th Cir. 1990).

It is difficult, if not impossible, to understand how Ms. Farrey's lien does not attach to "an interest" of Mr. Sanderfoot. Based upon the language of the judgment of divorce, the trial judge believed it attached to his interest, for the lien is " . . . against the real estate property of the Respondent . . . " (Judgment of Divorce, App. p. 57a).

Ms. Farrey argues that "(h)ad the lien been awarded either one day *before* or one day after the divorce on his title, the lien might be subject to the avoidance statute" (Br. p. 19). But how long must title be vested – one minute, one hour? Once the Court made its pronouncement of the award of assets, title as *between these parties* vested solely in Mr. Sanderfoot (See Footnote No. 2). The trial court, after significant discussion of the awarding of various other assets and assignment of debt, clearly recognized the effect of the award and provided for a balancing payment based upon the *entire* property division and then provided for a lien upon *Mr. Sanderfoot's* property to equalize the entire property division.

In determining if this first element is met, it is important to recognize that the code provides that a lien can be avoided if it is fixed " . . . on *an* interest . . . " of the debtor. The code does not say fixed on the interest or upon the sole interest, but on "an" interest of the debtor.

Based upon Ms. Farrey's own argument, Mr. Sanderfoot had "an" interest in the property based upon the joint ownership. Once she was divested of her interest by the divorce court, the only person with any incident of

ownership is Mr. Sanderfoot, for a lien, even a mortgage lien, does not vest legal or equitable title in the lien holder.[4] Thus, the lien must attach to Mr. Sanderfoot's interest, as Ms. Farrey's ownership interest terminated with the Court granting sole ownership to Mr. Sanderfoot.

Ms. Farrey attempts to equate the facts of this case with *In re Owen*, 877 F2d 44 (11th Cir. 1989), argued before this Court on November 5, 1990. The facts are significantly different. In *Owen*, Helen Owen obtained a judgment against Dwight Owen (debtor) on December 1, 1975 and recorded the same on July 29, 1976. In November, 1984, Dwight Owen purchased a condominium as his home. In 1984, Florida's exemption law applied only to the head of a family and only if the lien came into existence after the property attained homestead status. *Owen*, at pp. 45-46; Fla. Const. at 10, Sec. 4; Fla. Stat. Sec. 222.20.

The 11th Circuit refused to apply Section 522(f)(1) because the laws of the State of Florida provided that Mrs. Owen's lien " . . . attached to the property before the debtor was able to avail himself of the homestead right" (*Owen*, at p. 47). This is because at the time Mr. Owen purchased the condominium he was not entitled to a

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[4] Wisconsin follows the lien theory of mortgages. The full ownership, both equitable and legal, is in the mortgagor, and the interest of the mortgagee is that of a lien holder. The mortgagee is merely the holder of a security interest. *Glover v. Marine Bank of Beaver Dam*, 117 Wis 2d 684, 691-92, 345 NW 2d 449 (1984). See also Section 708.01, Wisconsin Statutes. This is not to admit that Ms. Farrey holds a mortgage as she has argued. See Section IB of this argument.

homestead exemption under Florida law[5] (*Owen*, at p. 47).

In the present case, there is no issue of the premises being Mr. Sanderfoot's homestead pursuant to Sections 815.20(1) and 990.01(14). Wisconsin Statutes. *In re Owen*, 877 F2d 44 (11th Cir. 1989), is simply irrelevant to this case based upon its facts and the applicable law.

Ms. Farrey argues that Mr. Sanderfoot " . . . never, not even for a moment, . . . (had) sole title to the real estate" (Br. p. 23). Ms. Farrey counts in milliseconds rather than looking at the clear effect of the judgment of divorce and the statutory provisions of Section 767.255 – vesting of sole ownership of the real estate in Mr. Sanderfoot; adding and subtracting assets and debt, dividing assets and the debt and finally awarding Ms. Farrey an amount of money to balance the property division, to be secured by a lien on *Mr. Sanderfoot's* real estate. Such a lien clearly impairs "an interest" of Mr. Sanderfoot in property for, at the point of the granting of the lien, Mr. Sanderfoot is the only person with any ownership interest in the property.

B. While State Law Will Determine the Definition of "Homestead" For Exemption Purposes, Federal Bankruptcy Law Will Determine the Avoidability of a Lien Pursuant to Section 522(f).

The second requirement of Section 522(f)(1) is that the lien must impair an exemption to which the debtor

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[5] Florida has "opted out" of the Federal exemptions. Fla. Stat. Sec. 220.20.

would otherwise be entitled. Until the brief filed by Ms. Farrey before this Court, "(n)either party nor the courts below focus(ed) on this aspect of the lien avoidance statute." *In re Sanderfoot*, 899 F2d 598 (7th Cir. 1990); App. p. 11a. We believe that this challenge has been waived. Assuming, however, that it has not been waived, Ms. Farrey asks too much.

She argues that the lien in the divorce judgment is a mortgage and not subject to the Wisconsin homestead exemption, citing *Wozniak v. Wozniak*, 121 Wis 2d 330, 359 NW 2d 147 (1984). Br. p. 24. As pointed out by Ms. Farrey, *Wozniak* is a case involving a question of *enforcement* of a judicial lien created in a divorce judgment against a surviving joint tenant who was not a party to the divorce. Br. p. 24.

The facts in *Wozniak* demonstrate that it is not applicable to a question of homestead exemption: Opal Wozniak owned a house in joint tenancy with her grandson. In a divorce action, William Wozniak was awarded a lien upon her interest in that non-homestead property:

> "As part of the divorce judgment, the trial court awarded Opal her interest in the property '(s)ubject to a lien to William J. Wozniak to secure payment to him of the sum of $8,817.38 . . . and further providing that in the event of a suit for foreclosure of said lien, expenses of such foreclosure including but not limited to taxable costs and attorney fees.' " (At p. 336.)

Opal died, and William commenced a foreclosure action. The surviving joint tenant intervened. In finding that the surviving joint tenant took decedent's property subject to the lien, the Court looked at Section 700.24,

Wisconsin Statutes; the language of the divorce judgment (providing for interest and foreclosure) and the provisions of Chapter 767, Wisconsin Statutes. No issue was raised regarding homestead exemption or Section 815.20, Wisconsin Statutes, because *Wozniak* is an enforcement case, not an exemption case.[6] It should also be noted that there is no indication in *Wozniak* as to whether the divorce was stipulated or contested.[7]

While there are several differences between the *Wozniak* language and the judgment in the *Sanderfoot* divorce, two are critical:

1. There is no interest rate determined by the trial court in Sanderfoot.
2. There is no indication that foreclosure is an allowable remedy for Ms. Farrey.

The *Wozniak* decision indicates that several factors demonstrate that the trial judge intended to give Mr. Wozniak a mortgage by awarding him a lien upon specific property, for a specific sum of money due on a specific date, setting an interest rate and providing for foreclosure as a remedy. *Wozniak*, 121 Wis 2d at 336-37.

At the close of the decision in *Wozniak*, the Wisconsin Supreme Court admonished divorce courts, at p. 337:

> "To avoid the problem created by the judgment in this case, trial courts should specify in the divorce judgment the type of lien awarded."

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[6] There is no indication in the *Wozniak* decision that the premises was the surviving joint tenant's homestead.

[7] The decision notes that the divorce judgment was not made a part of the record. *Wozniak*, 121 Wis 2d at 332, Footnote No. 1.

In the only case reported which cites the lien portions of *Wozniak*,[8] the Wisconsin Supreme Court indicated that the trial court should clearly specify the type of lien it was awarding. In *Lutzke v. Lutzke*, 122 Wis 2d 24, 48, 361 NW 2d 640 (1985), the Court stated:

> "It appears to us that, in the event (the trial judge) declares the intent of the judgment – whether the obligation is personal or not, whether the joint tenancy is severed or not – he will then be in a position to state with specificity the nature of the obligation and whether it is a mere judgment debt or whether it results in some security lien upon whatever share of the property inures to Vallerie Lutzke. See *Wozniak v. Wozniak*, 121 Wis 2d 330, 359 NW 2d 147."

Like *Wozniak*, the *Lutzke* case is a survivorship case under Section 700.24, Wisconsin Statutes, and not a claim for homestead exemption per Section 814.20, Wisconsin Statutes.

Ms. Farrey would have this Court interpret all awards in a divorce judgment as constituting a mortgage for all purposes. As pointed out previously, the only cases so finding are limited to survivorship rights pursuant to Section 700.24, Wisconsin Statutes. There is no mention of Section 815.20, Wisconsin Statutes, in either case. In comparing the two statutes, there is a significant difference.

The relevant portion of Section 815.20(1), Wisconsin Statutes, states:

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[8] The only other reported case, *Haack v. Haack*, 149 Wis 2d 243, 440 NW 2d 794 (Wis. App. 1989), cites *Wozniak* as authority for the broad discretion vested in a divorce court.

> "(1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and as otherwise provided."

Section 700.24 states:

> "A real estate mortgage, a security interest under Chapter 409, or a lien under Sections 71.91(5)(b), 72.86(2), Chapters 49 or 779, on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior to death subject to such mortgage, security interest or statutory lien."

The two statutes clearly protect different rights, one the rights of joint tenants in *any* real property (Section 700.24) and the other the rights in the owner/occupier of real property which is a homestead. That distinction is brought into sharper focus by the inclusion in Section 815.20(1) of language specifically exempting " . . . the lien of every judgment. . . . " Such language is missing in Section 700.24.

Regardless of how judgment liens are treated in survivorship issues or in enforcement cases, for exemption cases, the lien of *every* judgment is exempt as to homestead property up to the applicable statutory limit. It cannot be seriously argued that the lien imposed herein is not the lien of a judgment. Section 806.15, Wisconsin Statutes.

To argue, as Ms. Farrey does, that " . . . a mortgage, in Wisconsin, is not subject to the homestead exemption even if it has been created by a judicial lien" (Br. at p. 24) totally ignores the clear exemption for the lien of *every* judgment contained in Section 815.20(1), Wisconsin Statutes (emphasis added).

While we believe that a judicial lien is exempt pursuant to the plain language of Section 815.20(1), Wisconsin Statutes [and that the holding in *Wozniak v. Wozniak*, 121 Wis 2d 330, 359 NW 2d 147 (1984), must be limited to its facts], it is respectfully submitted that federal law will determine avoidability of the lien pursuant to Section 522(f) rather than state law.

Section 522(f) states, in part, that a lien may be avoided if it " . . . impairs an exemption to which debtor *would have been* entitled under subsection (b) of this section, if such lien is –

(1) a judicial lien."

This clause of Section 522(f) clearly means that a debtor can avoid a lien if it impairs an exemption to which the debtor would have been entitled *but for the lien*. See *In re Pederson*, 78 BR 264 (Bankr. 9th Cir. 1987) affirmed; *In re Pederson*, 875 F2d 781 (9th Cir. 1989). Thus, a lien which fits the Bankruptcy Code's definition of "judicial lien" is avoidable as to property which it would otherwise encumber. While state law will determine *what* property is exempt (i.e. the definition of homestead), federal law will determine the avoidability of the lien pursuant to Section 522(f). *In re Heape*, 886 F2d 280, 282 (10th Cir. 1989). See also *McKenzie v. Irving Trust Co.*, 323 US 365, 369 (1945).

Such a reading of Section 522(f) is consistent with the mandate of Article 1, Section 8, of the United States Constitution, providing for "uniform laws on the subject of bankruptcies throughout the United States."[9] By adopting Ms. Farrey's "like a mortgage" argument, the various states could, by calling a judgment lien a mortgage, frustrate the provisions of Section 522(f) and render them useless. Such a situation would result not in uniform laws but a hodgepodge of contradictory laws leading to havoc. *In re Sanderfoot*, 899 F2d at 600, App. p. 15a.

C. The Lien is a Judicial Lien Pursuant to 11 USC Section 101(32).

The last element of Section 522(f) is whether or not the lien of the divorce judgment is a judicial lien. Ms. Farrey does not take the position that it is not, as 11 USC Section 101(32) clearly provides that it is. The last element is met.

II. THERE IS NOTHING IN THE PLAIN LANGUAGE OF SECTION 522(f) NOR IN THE LEGISLATIVE HISTORY TO SUGGEST THAT CONGRESS INTENDED THAT A CONTESTED DIVORCE JUDGMENT IS TO BE TREATED DIFFERENTLY FROM ANY OTHER JUDGMENT.

Mr. Sanderfoot urges adoption of what we have called the *Pederson* line of cases [*In re Pederson*, 875 F2d

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[9] Such a reading is also consistent with and harmonizes Section 522(c) regarding property liable for debts incurred before filing and with the intent of Congress. See Section II of this argument.

781 (9th Cir. 1989)], while Ms. Farrey exposes the *Boyd* line of cases [*Boyd v. Robinson*, 741 F2d 1112 (8th Cir. 1984)]. It is respectfully submitted that the *Pederson* line of cases presents a clear, concise and logical interpretation and harmonizing of various Bankruptcy Code sections, including:

A. 11 USC Section 522(f) – Lien Avoidance;

B. 11 USC Section 101(32) – Definition of Judicial Lien;

C. 11 USC Section 101(33) – Definition of Lien;

D. 11 USC Section 101(44) – Definition of Security Agreement;

E. 11 USC Section 101(45) – Definition of Security Interest;

F. 11 USC Section 522(c) – Property Liable for Debt;

G. 11 USC Section 523 – Exceptions to Discharge; and

H. 11 USC Section 727 – Discharge.

The *Boyd* line of cases, on the other hand, presents a convoluted attempt to ignore the clear meaning of the above referred to sections. The *Boyd* cases represent an attempt by the various courts to bend the Bankruptcy Code to meet their perception of justice in a divorce case rather than applying the clear and unambiguous language of the relevant code provisions.

Ms. Farrey goes to great lengths to argue that the decision of the Seventh Circuit Court conflicts with the clear meaning of the statute, the purpose and legislative history of Section 522(f)(1) and the Bankruptcy Code itself. As previously argued, the statute is clear. It is the

cases, finding liens in contested divorces nonavoidable, which are unclear.

A. The Literal Application of Section 522(f) Will Not Produce a Result Different From That Intended by Congress.

This Court has previously heid that where courts are presented with a dispute over the meaning of a statute and the statute's language is plain, "the sole function of the courts is to enforce it according to its terms," and that plain meaning " . . . should be conclusive, except in the 'rare cases [which] the literal application of the statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enterprises*, 489 US 235 (1984). In the instant case, the plain meaning of Section 522(f) is not demonstrably at odds with the intent of Congress.

What was Congress's intent in enacting Section 522(f)? The legislative history of Section 522(f) reveals two (2) entries:[10]

1. Senate Report No. 95-989 at 77, 1978, U.S. Code Congressional and Administrative News at p. 5862 states: "Subsection (f) protects the debtor's exemptions, his discharge and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of

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[10] Ms. Farrey's brief, at p. 29, indicates that the *only* legislative history is in H.R. Rep. No. 595, at 126-27, 1978.

the lien, and may similarly avoid a non-purchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions."

2. H.R. Rep. No. 95-595 at 126-27, 1978, U.S. Code Congressional and Administrative News at pp. 6087-88 states: "In addition, the bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial lien on exempt property, and any nonpurchase money security interest in certain household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor in to court, the debtor is nevertheless entitled to his exemptions."

Ms. Farrey neglects to read both of the above quoted items of legislative history with the provisions of Bankruptcy Act Section 67a and the final form of Section 522(f). While the House Report contains a "race to the courthouse" reference, the Senate Report does not nor does Section 522(f).

This is significant when examining the final form of Section 522(f) in light of the provisions of Bankruptcy Act 67a [11 USC 107(a)]. 11 USC Section 107(a)(1) (1976), provided:

> "(a)(1) Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceeding within *four months before the filing of a petition* initiating a proceeding under this title by or

> against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was *insolvent* or (b) if such lien was sought and permitted in fraud of the provisions of this title: *Provided, however,* that if such person is not finally adjudged a bankruptcy in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided." Emphasis added.

Section 107(a)(1) had three (3) primary requirements:

A. That the lien had been obtained by attachment, judgment, levy or other legal or equitable process or proceeding;

B. That the lien must have been obtained within four months of the filing; and

C. That the judgment debtor had to be insolvent when the lien was taken.

Section 522(f) of the Bankruptcy Code totally eliminated two of the three qualifiers. Had Congress intended the "race to the courthouse" provision to be a part of the Code, the language of 107(a) on time limits would have been retained. Insolvency when the judgment is entered was also eliminated.[11] Thus, the sole intent of Congress was to permit avoidance of a judicial lien upon meeting the three criteria of Section 522(f), regardless of when the judgment was obtained or the solvency of the debtor when the judgment was taken.

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[11] The "definition" of judicial lien contained in 11 USC 107(a) (1976) is almost identical to 11 USC Section 101(32).

Ms. Farrey overreaches when arguing that it was the intent of Congress to protect "the debtor's 'fresh start' from (only) the predatory credit practices" of judicial lien creditors. Br. p. 30. Such an intent cannot be read into Section 522(f). There is no time limit or insolvency requirement as in 11 USC 107(a)(1) (1976). There is no requirement that execution, garnishment or other realization upon the judgment be instituted or imminent to allow avoidance Rather, Section 522(f) permits avoidance of the operation of any judgment lien "on any property to the extent that the property could have been exempted in the absence of the lien." Senate Report No. 95-989, at 77, 1978. U.S. Code Congressional and Administrative News at p. 5862.

Rather than being at odds with the express intent of Congress, the decision of the Seventh Circuit reflects that intent.

The intent of Congress can also be seen in the provisions of 11 USC Section 522(c) and 11 USC Section 523. Section 522(c) provides that exempt property is not liable for any debt which arose before filing except for taxes [523(a)(1)]; maintenance or support [523(a)(5)]; debts secured by liens not avoided pursuant to Sections 522(f) and (g), 506(d), 544, 545, 547, 548, 549 or 724(a) and tax liens.

Section 523 sets forth the debts which are or may be nondischargeable. Simply because a debt may be found to be nondischargeable pursuant to Section 523, does not result in the lien avoidance provisions of Section 522(f) being inapplicable. Indeed two courts have held that the

lien of a debt determined to be nondischargeable pursuant to Section 523(a)(4) and (a)(6) are avoidable. See *In re Walters*, 879 F2d 95 (3rd Cir. 1989), and *In re Hampton*, 104 BR 527 (Bankr. M.D. Georgia 1989). The only prepetition debts from which exempt property is not insulated are taxes, alimony, maintenance and support. Section 522(c)(1). Senate Rep. No. 95-989, 1978, U.S. Code Congressional and Administrative News, 5787, 5862, H.R. Rep. No. 95-595, 1978 U.S. Code Congressional and Administrative News 6317.

The award to Ms. Farrey by the Circuit Court for Outagamie County is for a property division. There was never a claim by Ms. Farrey that it was anything but a debt due for a balancing payment on property division. As conceded by Ms. Farrey, the debt is dischargeable. Br. at p. 34.

The dischargeability or nondischargeability of the property division is not, however, the issue in this case. Nor is there an issue of denial of discharge pursuant to 11 USC Section 727(a).[12] The issue in this case is whether a

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[12] The concept of nondischargeability of a specific debt pursuant to 11 USC 523 is considerably different from denial of a discharge pursuant to 11 USC 727(a). In this case, no adversary proceeding was brought by anyone, including Ms. Farrey, contesting the granting of Mr. Sanderfoot's discharge. Such an adversary proceeding is required by 11 USC Section 727(c)(1), (d) and (e). Bankruptcy Rule 4004 sets forth the procedure for filing a complaint objecting to discharge. Contrary to Ms. Farrey's argument, unless the debtor is not an individual, a complaint objecting to discharge has been timely filed or debtor filed a waiver of discharge, the bankruptcy court *shall* grant the discharge. Bankruptcy Rule 4004(c).

lien imposed in a contested divorce action is a judicial lien subject to avoidance pursuant to Section 522(f)(1). If a discharge is denied or revoked pursuant to Section 727, there is no issue, for the provisions of Section 522(f) would not apply. If a debt is deemed nondischargeable based upon fraud, the lien of a judgment is still avoidable [*In re Walters*, 879 F2d 95 (3rd Cir. 1989)], but post-petition property is liable for its satisfaction. If a debt is nondischargeable because it is maintenance, alimony or child support as defined in Section 523(a)(5), debtor's prepetition property would be liable for the debt pursuant to Section 522(c)(1). Congress clearly chose not to treat property division differently from ever other judgment.

B. The Reading of Section 522(f)(1) Proposed by Ms. Farrey Invades the Legislative and Policy Prerogatives of Congress.

What Ms. Farrey is actually seeking is to have this Court impose upon Section 522(f)(1) an exception not in the plain language of the statute nor capable of being placed in the statute through Congressional intent or through longevity of precode practice. Had Congress intended liens for property division payments in contested divorces to be treated differently from other judicial liens, it would have so stated in clear terms. For whatever reason, Congress did not, through nearly a decade of work on the Code, do so.

Indeed, to this day Congress has not modified the language applicable in this case. Congress has stated a

policy – judicial liens are avoidable if such a lien meets the criteria of Section 522(f).

The policy itself or the wisdom of the policy is addressed to Congress, not the courts. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 US 837 (1984). To read into the Bankruptcy Code the exception Ms. Farrey seeks does violence not only to the Code itself but invades the prerogatives of Congress in the legislative process.

Ms. Farrey has made much of the convergence of state domestic relations law and bankruptcy law. This convergence was recognized by Congress with the resultant protection of dependent spouses and children through the provisions of Sections 522(c) and 523(a)(5). To impose an exception for property division liens goes too far.

While the result may be harsh, many results in the application of bankruptcy are harsh. Contracts are impaired through the provisions of Section 522(f)(2); individuals and businesses which have provided services to or lent money to debtors are unable to collect; state laws allowing for judicially imposed remedies cannot be enforced.

While the result of properly interpreting the Bankruptcy Code may be harsh, it does not strip the state divorce courts of their broad discretion nor would giving effect to the clear language of Section 522(f) threaten the integrity of the court system.

The divorce courts in Wisconsin and, we believe, in every jurisdiction are vested with considerable discretion

in making property divisions. These courts can fashion remedies which will protect all of the parties to a divorce while recognizing the potential intrusion of bankruptcy, just as they recognize the effect of tax laws.

Contrary to Ms. Farrey's position, affirming the Seventh Circuit decision will not necessarily result in the abuses Judge Posner foresaw, as there are ample tools in the Bankruptcy Code itself for "ferreting out abuses." *In re Pederson*, 875 F2d at 784.

CONCLUSION

Congress has framed a uniform law regarding bankruptcies, based upon Article 1, Section 8, and Article 6 of the United States Constitution. As part of that law, Congress has stated that judicial liens may be avoided if:

A. The lien fixes upon an interest of the debtor;

B. The lien impairs an exemption the debtor would have been entitled to but for the lien; and

C. The lien is a judicial lien as defined in the Bankruptcy Code.

The lien of the judgment of divorce granted to the parties clearly meets each of the above provisions. The

decision of Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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